Petition

81-1148

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No.

IN THE

Supreme Court of the United States

October Term, 1981

WILLIAM BUTLER and DONALD IRISH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Questions Presented.

1. Whether the Civil Court of the City of New York is an "enterprise" within the meaning of the RICO statutes (18 USC §§ 1961 *et seq.*).

2. Whether, where an indictment charges a conspiracy to violate RICO, a violation of RICO, extortion and mail fraud, all based on the factual allegation that defendants, officials of a court, took bribes, evidence is admissible that it was the general "custom and practice" of the defendants and others similarly situated to take such bribes; whether, if such evidence is inadmissible, its admission was harmless error.

3. Whether, in a Hobbs Act extortion prosecution, where there is no evidence that the buyers with whom defendants did business had an effect on interstate commerce, it is sufficient to sustain the interstate commerce predicates that persons who were associated with such buyers acted in interstate commerce in other transactions.

4. Whether, where it is not necessary to carry out a scheme that mails be used and there is evidence that a scheme was carried out without the use of the mails, the use of the mails for a defendant's convenience and as a result of the scheme is such a use as is criminalized by the mail fraud statute.

Parties.

All of the parties to the proceedings in the United States Court of Appeals for the Second Circuit were the petitioners, William Butler and Donald Irish, and Peter Angelilli and Donald Ribotsky.

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SUPREME COURT OF THE UNITED STATES

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vs.

UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Opinion Below.

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided September 4, 1981, and reported at 660 F. 2d 23, is annexed hereto as an appendix.

Jurisdiction.

(a) The judgment of conviction was rendered and entered on November 7, 1980, convicting each of the petitioners of the crimes of conspiracy to violate the "RICO"

statute, 18 USC §1962(d); of engaging in a pattern of racketeering activity in violation of 18 USC §1962 (c); of extortion under "color of official right" in violation of the Hobbs Act, 18 USC §1951; and of mail fraud in violation of 18 USC §1341.

(b) The judgment of affirmance of the United States Court of Appeals is dated September 4, 1981. The order of the United States Court of Appeals, which denied a rehearing, is dated November 5, 1981.

(c) Jurisdiction to review the judgment in question by certiorari is conferred by 28 USC §1254(1).

Constitutional and Statutory Provisions Involved.

The constitutional provisions involved are the Due Process Clause (Fifth Amendment), the Commerce Clause (Act 1, Sec. 8, Clause 3) and the Reserve Powers Clause (Tenth Amendment).

The statutes involved are 18 USC §1961(2), 18 USC §1961(3), 18 USC §1961(4), 18 USC§1962(c), 18 USC §1962(d), 18 USC §1951(a), 18 USC §1951(b)(2); 18 USC §1341, Rule 406 of the Federal Rules of Evidence, Rule 404(b) of the Federal Rules of Evidence.

Statement of the Case.

Petitioners William Butler and Donald Irish were tried jointly with Peter Angelilli and Donald Ribotsky before Honorable Jacob Mishler and a jury in the United States District Court for the Southern District of New York.

The defendants were all Marshals of the City of New York empowered to conduct auctions in execution of judgments issued out of the Civil Court of the City of New

York. The crimes charged arose out of their activities as such Marshals.

Petitioners, as well as other defendants, were convicted of conspiracy to violate RICO (18 USC §1962(d)), violation of RICO (18 USC §1962(c)), and violation of the Hobbs Act (18 USC §1951). Only the petitioners and defendant Ribotsky were convicted of Mail Fraud (18 USC –§1341); defendant Angelilli was acquitted of that count.

Execution on judgments out of the Civil Court of the City of New York is sometimes accompanied by levy and public sale by auction of judgment debtors' property. The auctions are conducted by marshals themselves or by auctioneers hired by marshals and paid out of the funds realized.

The marshal is also authorized to deduct authorized fees and expenses from the proceeds and directed to remit enough of the remainder to the judgment creditor or his attorney to satisfy the judgment debt; any excess should go to the judgment debtor.

The indictment in this case originally contained 25 counts and charged eleven marshals, including the four defendants, and two auctioneers with various violations on account of the conduct of the sales.

As the result of plea-bargaining, the case went to trial only against the four defendants, and each was charged and except for appellant Angelilli was found guilty, as indicated, of participating in the affairs of the Civil Court through a pattern of racketeering (RICO, 18 USC §1962(c)); conspiracy to violate RICO (18 USC §1962(d)); extortion under color of official right (18 USC §1551); and mail fraud (18 USC §1341). Angelilli was acquitted of the mail fraud charge and convicted of the others.

The burden of the charges lay in the claim that each of the defendants was bribed to conduct sales at auctions to produce deflated prices. There was testimony with regard to petitioners that they received such bribes, which was called "money on top" or "top money."

After the allegedly sham auction, another auction was held which witnesses called a "knockout" at which the property was sold at a higher price. The excess was divided among the customers and a regular group of buyers who attended the auction sales.

Significantly, the rules under which the marshals were required to operate demanded that notices of auction sales be published in newspapers not sooner than the morning of the auction. While the rule seems to have been conceived for the purpose of reducing the time ... which a judgment debtor could conceal his property, its effect was that there arose a select group of buyers at auctions, who came to know each other and the auctioneers.

The auctioneers and buyers who testified under grants of immunity and other inducements described specific auctions and specific deals.

Both petitioners testified and denied they took the bribe or "top money" alleged. Each petitioner stated he believed the auctions were honest, and in every case the auction was conducted by an auctioneer who controlled the recognition and flow of bids.

The petitioners conducted sales separately and the testimony as to them dealt with different auctions. Each petitioner left the site of the auction when it was concluded. If a "knockout" took place, neither was there and each testified he knew nothing about it.

Butler testified that the auctioneer, Lee Goldman, who testified against him, and Goldman's brother, talked privately to the assembled regular buyers and would then report to Butler their idea of what the sale might bring. Goldman said he reported the allegedly fixed price. While Butler is now convinced that such collusive agreements did take place, he played no part in them and claims he was victimized.

The RICO counts of the indictment are grounded for jurisdictional purposes on the claim that the Civil Court is an "enterprise." The Hobbs Act extortion counts rest exclusively on the fact that petitioners were City Marshals, and the mail fraud counts relate to the mailings to judgment creditors' attorneys of proceeds of sales which the Government claimed were less than that actually due and the concealing of the taking of top money.

Despite the vigorous denials of petitioners and the raising of hotly contested issues of fact, they were found guilty as indicated. In large measures the finding of guilt was based on the Trial Court's permitting thirteen of the witnesses to testify that it was the regular custom and practice of the New York City marshals to demand and accept "top money."

Reasons for Granting the Writ.

I.

The Civil Court is not an enterprise within the meaning of RICO. For Congress to have included it would have been unconstitutional.

The power of Congress to enact RICO is derived from the Commerce Clause (U.S. Const. Art. 1, section 8, clause 3), which authorized it to "regulate commerce . . .

among the several States." By virtue of such authority, Congress enacted RICO to deal with therein specified categories of criminal conduct affecting commerce.

The constitutional underpinning, however, is limited in this case by the Reserve Powers Clause contained in the 10th Amendment to the Constitution. It is there provided:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Underlying the petitioners' argument is the precept set forth in *Fry v. United States*, 421 U. S. 542, 547 n.7, 44 L. Ed. 2d 363, 95 S. Ct. 1792, as follows:

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered', *United States v. Darby*, 312 US 100, 124, (85 L.Ed. 609, 61 S. Ct. 451, 132 ALR 1430) (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. 421 U.S., at 547 n.7, 44 L.Ed.2d 363, 95 S. Ct. 1792."

The Civil Court of the City of New York is a vital and independent unit within New York State's judicial system. It was established by the New York State Legislature under authority of Article 6 §15 of the New York State Constitution.

A court is an imaginary organ of the government.

> "Generally speaking, the word, 'court' in the technical sense and as used in this article, describes an organ of the government, consisting of one person, or of several persons, called upon and authorized to administer justice."
>
> " . . . the modern conception of 'court', (which) refers to a governmental institution rather than a place" (20 Am. Jur. 2d Courts §1).

Among the various definitions of "court" which seem to have received acceptance is that of District Judge Neese in *Wood v. Circuit Court of Warren County, Tenn.*, 331 F.Supp. 1245 (DC, ED Tenn. 1971):

> "A 'court' is not a legal entity which may sue and be sued, but is an organ of the government authorized to administer justice."

As a court, the Civil Court initiates no action but, rather adjudicates according to law such controversies as are brought before it by litigants.

That the concept "enterprise" in 18 USC §1961(4) did not include a court was made manifest by Congress itself.

The description by Congress of what it sought to outlaw, for purposes of this case, appears at 18 USC §1962 (b) and (c). In each instance, the statute speaks of "any enterprise," and then qualifies "enterprise" wth the usual rubric which attaches it to interstate commerce.

Nowhere does Congress speak of racketeering activity which affects an instrumentality of the state, such as a court.

Yet, Congress clearly drew a distinction between "an enterprise" and an instrumentality of the State of New

York, such as a court. The working definition of the word "enterprise" for purposes of RICO appears at 18 USC §1961(4). It specifically does not impinge upon the working definition of an instrumentality of the State. The definition of "State" appears at 18 USC §1961(2), and that clearly comprehends an "instrumentality thereof." There is no argument with the fact that the Civil Court is an instrumentality of the State of New York.

Turning again to 18 USC §1962, Congress made it unlawful for persons employed by "any enterprise" to engage in racketeering. If Congress had intended to include an instrumentality of the State, it could have said so in no uncertain terms; it had created a working definition for itself in the very same chapter, just one section before the section dealing with prohibited activities. The word "State" appears several times in that chapter and, from the broad reach of RICO, it is clear that it was not overlooked when States and their instrumentalities, such as courts, were not included within the section (§1962) dealing with prohibited activities.

The question of whether a court may be considered an enterprise within RICO has not been settled by this Court. As adumbrated by the dissent of Circuit Judge Friendly below, the question is beyond the episodic or academic, and its resolution will have immediate importance far beyond the particular facts and parties involved.

The majority opinion below demonstrates (660 F.2d at page 33) that the inroads made by Federal courts into state matters have already assumed gigantic and expensive proportions. In its citation of other matters of municipal concern to which RICO has been applied, the opinion speaks of a county prosecutor's office, county law enforcement officials, a county attorney, a county sheriff's department, police departments, a State Bureau of Cigarette and

Beverage Taxes, a state governor's office, Redevelopment Authority and a Traffic court.

As the majority opinion of this Court pointed out in *United States v. Turkette,* _____ U.S. _____, 101 S.Ct. 2524, 69 L.Ed.2d 246, 257 (1981), when Congress intended that RICO should criminalize conduct that was also criminal under state law, it included within the definition of racketeering activities a number of state crimes.

If Congress had intended to address itself to racketeering involving state agencies which had impact on interstate commerce, it should have said so clearly. A majority of this Court stated in *United States v. Bass,* 404 U.S. 336, 349, 350, 92 S. Ct. 515, 30 L.Ed.2d 488, 497, 498:

> "There is a second principle supporting today's result: unless Congress conveys the purpose clearly, it will not be deemed to have significantly changed the federal-state balance.
>
> * * *
>
> In the instant case, the broad contention urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources."

A reading of the reports of the debates and hearings before the House and Senate fails to reveal a single word of concern about state or city agencies as being infiltrated by organized crime. One would expect that if there were such concern, some elected legislator would have expressed it. One may also speculate that if a legislator mentioned that he was concerned with a pattern of racketeering in an office of the sheriff, he would have been hooted down with statements of not desiring the Federal Government to

spend its resources and manpower in the investigation of state, city, town and village agencies.

That states are handling such matters in their own agencies and political subdivisions is clearly exemplifed by the appointment by governors of Special Prosecutors, such as the one in New York who gained national recognition in carrying out his mandate to ferret out wrong-doers in the court system. That office is still carrying on its work (*Dondi v. Jones,* 40 N.Y.2d 8, 386 N.Y.S.2d 4).

II.

The admission of evidence of "custom and practice" of Marshals to take bribes rendered the trial unfair.

The Trial Court permitted several witnesses to testify that it was the "custom and practice" at sales conducted by Marshals for the Marshals to receive "top money" or bribes.

The majority opinion in the Court of Appeals held that such evidence violated Rule 404(b) of the Federal Rules of Evidence, but come to the conclusion that the evidence "did not influence the jury in the slightest" (660 F.2d at page 42).

There is no criminal case in which this Court authorized the use of evidence of custom and usage of defendants to commit crimes and held that such evidence could not influence a jury.

Quite the contrary. It is of universal perception that proof of other crimes is so highly prejudicial that, unless the proof falls into one of the exceptions to the rule of exclusion, it may not be admitted.

> "Place a man's bad record before the jury and it is almost impossible for them to take an impartial view of the case brought against him. Slight evidence becomes magnified. Every defense is liable to appear suspicious" (*Regina v. Farris*, 1 Q.B. 129, 131 [1941]).

That the perception of the public is in the same vein is evidenced by the ancedote which appears at Case & Comment, May-June, 1957, p. 31 (cited in Fisch on New York Evidence, Second Edition, 1977, p. 121).

> "The accused had been duly convicted when it was proved on further evidence that he actually had been in prison at the time the act was committed. 'Why didn't you say so?' demanded the judge. 'Well,' said the prisoner apologetically, 'I was afraid of prejudicing the jury against me.' "

There is no authority for the introduction of such evidence in this case, and its introduction violates fundamental rules of evidence in criminal cases.

The rule upon which the District Court relied, Rule 406, does not apply in the case at bar. Rule 406, dealing with "Habit; Routine Practice," is confined to "the habit of a person or of the routine practice of an organization. . . ."

The testimony spoke only of the custom of Marshals, not any particular Marshal and not an organization of Marshals.

The testimony did not deal with a single fact; thirteen witnesses testified about custom and practice; other than the claims with respect to the specific transactions charged (which were certainly not elicited to prove custom and practice) there was no evidence that any of the defendants

demanded "top money" at any time. All of the evidence dealt with the general, conclusory statement that it was their custom and practice to demand top money.

The conclusory nature of the testimony demonstrates that its sole purpose was to illustrate the bad character of the defendants. Its function was to prove that when a particular defendant was charged with taking "top money," he must have taken it, for such a taking would be in conformity with the custom and practice of marshals to take "top money"; in other words with the predilection of marshals to take bribes.

No defendant could testify about the practice and usage of Marshals to take "top money," since there was no foundation evidence that they regularly attended the sales of the other marshals. Each defendant found himself tarred with a custom against which there was no rejoinder, and each defendant became an habitual criminal.

In essence the purported "custom and practice" became evidence of the character of the defendants to show that they acted in conformity with that character. Such evidence runs directly counter to the prohibition set forth in Rule 404 (b) of the Federal Rules of Evidence, which states in part:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

In this case where the questions of fact were close, where admitted professional criminals testified for the prosecution that they raised their children to be criminals, the black tar of an invidious "custom and practice" made it impossible for the trial to be fair.

The sanctioning of the evidence by the District Court and its approval by the Court of Appeals now instruct prosecutors that custom and practice evidence of bribe taking is legal in a conspiracy case.

It is such a departure from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision.

III.

There was no evidence that acts of petitioners affected commerce sufficiently to sustain the Hobbs Act convictions.

The Hobbs Act convictions were the result of bootstrap activities with respect to commerce. The charge in the indictment with respect to interstate commerce rested on the claim that money was received from "the buyers whose activities affected commerce at the said auction sales . . ." (Indictment, Count 3, para. 3).

The Court of Appeals found that buyers acted as a unit, and a sale to one of them who himself happened not to engage in interstate commerce would nevertheless have the required effect on commerce since he was joined in the auctions with other buyers (660 F.2d at p. 35).

In the absence of the RICO counts, there would have been no evidence of what others did. Even with the RICO conspiracy, reliance on what others may have thereafter done for the commerce effect requirement violates the fundamental rule that guilt is individual. It is the burden of petitioners' argument that the individual counts of the Hobbs Act violations could not be sustained in the absence of specific testimony that a particular sale at a particular auction had an effect on interstate commerce.

The District Court's very jurisdiction under Section 1951 depends upon Congress' power to regulate interstate commerce (*United States v. Augello,* 451 F.2d 1167, 1169 [2nd Cir. 1971], *cert. denied,* 405 U.S. 1070 [1972]; *United States v. Gill,* 490 F.2d 233, 236-37 [7th Cir. 1973], *cert. denied,* 417 U.S. 968 [1974]; *United States v. Mitchell,* 463 F.2d 187, 193 [8th Cir. 1972], *cert. denied,* 410 U.S. 969 [1973]; *United States v. Mazzei,* 390 F.2d 1098, 1104 [W.D.Pa.], *cert. denied,* 423 U.S. 1014 [1975]). Thus, interference with commerce is an essential element of any Hobbs Act violation (*Stirone v. United States,* 361 U.S. 212, 218 [1960]).

Accordingly, interstate involvement is an essential element of any Hobbs Act violation and the interstate involvement upon which the conviction is based must be the same interstate involvement alleged in the indictment (i.e., the buyers). Any failure to so prove falls short of proving a Hobbs Act violation (*Stirone v. United States, supra; United States v. Addonizio,* 451 F.2d 49 [3rd Cir. 1972; *cert. denied,* 405 U.S. 936, 92 S. Ct. 949, 30 L.Ed.2d 812, *reh. denied,* 405 U.S. 1048, 92 S.Ct. 1309, 31 L.Ed.2d 591; *United States v. Nakaladski,* 481 F.2d 289 [5th Cir. 1973], *cert. denied,* 414 U.S. 1062, 94 S.Ct. 570, 38 L.Ed.2d 469 [1974]).

Heretofore, the question of the need for an impact on commerce has been very clear. Even the case cited by the Court of Appeals, *United States v. Calder,* 641 F.2d 76 (2 Cir. 1981), as an example of a potential or subtle effect on commerce, required that the effect be tied in with the act. The effect on commerce in this case arises from acts of others, wholly apart from a particular marshal and the buyer or buyers with whom he may have been involved in the performance of the acts charged.

This is no mere episodic occurrence. Bringing the interstate commerce into the fact pattern by relying on third party acts is a far departure from the guidelines set down in applicable decisions of this Court and is in conflict with them.

IV.

The use of the mails was collateral to the scheme and the convictions for mail fraud constituted error.

Use of the mails was not part of the claimed RICO conspiracy, and it was not part of the scheme that the mails should be used to gull innocent victims.

As the District Court put it in the Memorandum of Verdict which it prepared and gave to the jury, the charge in connection with the mail fraud statute was:

> "Defendant used the mails for the purpose of executing the scheme to defraud judgment-debtors by selling assets of judgment-debtors at deflated values through sham sales."

Each of the four defendants who were tried was charged with a similar violation of 18 USC §1341.

The defendant, Angelilli, who was found guilty of the RICO conspiracy, was acquitted of the mail fraud charge. The jury thus demonstrated that in its collective mind the conspiracy could be carried out, and in fact was carried out by at least one defendant, without the use of the mails. Such a circumstance demonstrates the applicability of the language of the majority of this Court in *United States v. Maze,* 411 U.S. 395, 405, 38 L.Ed.2d 603, 611, 94 S.Ct. 645 (1974), when it affirmed the Court of Appeals for the Sixth Circuit:

> "Since the mailings in this case were not for that purpose, (the carrying out of the scheme), the judgment of the Court of Appeals is affirmed."

The use of the mails in the case at bar, was, at the very worst, the result of the acts which the Government claims to be the RICO violations. Obviously, it occurred subsequent to the allegedly "fixed" sales. While the Second Circuit Court of Appeals has said there in no *per se* rule that a mailing after a defrauder has obtained his ill-gotten gain precludes a conviction (*United States v. Chason,* 451 F.2d 301, 303, 1971 *cert. denied,* 405 U.S. 1016, 31 L.Ed.2d 479, 93 S.Ct. 1291), the fact that a mailing took place after the acquisition of the fruits of a crime may not be ignored. That bears directly on whether the mailings were made for the purpose of executing the allegedly fraudulent scheme.

If the mails were not used for that purpose, the use of the mails does not constitute a crime.

During the entire trial the position of the Government was that the Civil Court was an "enterprise" and that the defendants were guilty of misusing that enterprise through a pattern of racketeering activity. The activity consisted of conducting fraudulent and sham auction sales. The use of the mails had nothing to do with the scheme.

It was the Government's contention during the entire case that prices of the auctioned wares were artificially depressed at sham auctions. The prosecution urged and argued that the Marshal defendants consented to the deflated prices in return for "top money," which they received either with or after their receipt of the deflated price realized at the auction.

In any event, when the auctions, real or sham, were finished, the Marshals received the amount bid and left the

premises. The regular participants stayed to divide the profits, one way or another, according to the prosecution.

It then became the Marshals' duty to distribute the proceeds to judgment creditors after deduction of fees, expenses and taxes (CPLR §5236g). While the Civil Practice Law and Rules deal with sheriffs, "all provisions of law relating to the powers, duties and liabilities of sheriffs in like cases and in respect to the taking and restitution of property, shall apply to marshals" (New York Civil Court Act, §1609, *Eckstein v. Massachusetts Bonding & Insurance Co.*, 281 N.Y. 435, *rearg. denied,* 282 N.Y. 590; *Ettinger v. Wilke,* 79 Misc.2d 387, 358 N.Y.S.2d 597, 1974).

The distribution of the proceeds by the Marshals by mail had nothing to do with the execution of the claimed scheme. This was not a case where the mails were employed for the purpose of lulling a victim into inaction or providing a false sense of security.

The requirement that the proceeds be distributed was mandated by law, and the use of the mails was no part of the scheme. The plot was finished by the time the proceeds were delivered. Three of the defendants stipulated that the checks representing the proceeds were in fact mailed. Angelilli did not stipulate to that effect, and he was acquitted of the mail fraud charge.

The Government is in no better position here than the prosecution was in *Parr v. United States,* 363 U.S. 370, 389, 4 L.Ed.2d 1277, 1289, 80 S.Ct. 1171, where this Court reversed a conviction of the defendants under 18 USC §1341, and said:

> "Thus, as its terms and purpose make clear, '(t)he federal mail fraud statute does not purport to

> reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.' "

Congress specifically shunned the opportunity to make criminal use of the mails as a result of a violation of 18 USC Chapter 96, which is RICO.

Section 1962 of that chapter deals with matters which "result" from "patterns of racketeering activity." Subdivision (a) makes it a crime to invest funds, which result from a pattern of racketeering activity, in the acquisition of an interest in an enterprise which affects commerce.

Congress, seeking to attack racketeering by cutting off the ability to invest resulting proceeds, could easily have outlawed the use of the mails as a result of forbidden RICO activity. This it did not do.

Using language that might have been written for this case, the majority of this Court, in face of the cited dissent of Chief Justice Burger, said in *United States v. Maze:*

> "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice . . . '. Since the mailings in this case were not for that purpose, the judgment of the Court of Appeals (which reversed the mail fraud conviction) is Affirmed" (414 U.S. at p. 405; 38 L.Ed.2d at p. 603).

The mail fraud statute did not criminalize the use of the mail in a situation in which, as in the case of Angelilli, it was not necessary to use the mail to carry out the charged fraud, but a defendant does use the mails for his convenience.

The ruling below is in conflict with the decisions of this Court that use of the mails be "for the purpose of executing such scheme or artifice," if it is to be considered criminal.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

CHARLES HAYDON
Attorney for Petitioner Butler
WILLIAM SONENSHINE
Attorney for Petitioner Irish

APPENDIX A—Opinion of United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1039-42—September Term, 1980

(Argued March 12, 1981 Decided September 4, 1981)

Docket Nos. 80-1431, -1434

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

PETER ANGELILLI, WILLIAM BUTLER, DONALD IRISH, and DONALD RIBOTSKY,

Defendants-Appellants.

Before:

FRIENDLY, MANSFIELD, and KEARSE,

Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Eastern District of New York, after a trial before Jacob Mishler, *Judge*, and a jury, for violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. §§ 1962(c) and (d), extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and use of the mails to defraud in violation of 18 U.S.C. § 1341.

Convictions of appellants Butler, Irish, and Ribotsky affirmed. Conviction of appellant Angelilli affirmed as to violations of 18 U.S.C. §§ 1962(c), 1962(d), and 1951; judgment remanded for correction to reflect acquittal as to 18 U.S.C. § 1341.

RONALD G. RUSSO, Special Assistant United States Attorney, Brooklyn, New York (Edward R. Korman, United States Attorney for the Eastern District of New York, of counsel), *for Plaintiff-Appellee.*

GILBERT S. ROSENTHAL, New York, New York, *for Defendant-Appellant Angelilli.*

CHARLES HAYDON, New York, New York, *for Defendant-Appellant Butler.*

WILLIAM SONENSHINE, Brooklyn, New York, *for Defendant-Appellant Irish.*

IRVING ANOLIK, New York, New York, *for Defendant-Appellant Ribotsky.*

KEARSE, *Circuit Judge:*

Defendants Peter Angelilli, William Butler, Donald Irish, and Donald Ribotsky appeal from judgments of conviction entered after a jury trial in the United States District Court for the Eastern District of New York, Jacob Mishler, Judge. The trial and convictions related to acts of defendants as Marshals of the Civil Court of the City of New York, in conducting fraudulent auctions of the property of judgment debtors in that court. All defendants were convicted of engaging in a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. § 1962(c) (1976), of conspiring to violate RICO, in violation of 18 U.S.C. § 1962(d) (1976), and of extortion under "color of official right" in violation of the Hobbs Acts, 18 U.S.C. § 1951 (1976). In addition, Butler, Irish, and Ribotsky were convicted of using the mails to further a scheme to defraud in violation of the mail fraud statute, 18 U.S.C. § 1341 (1976); Angelilli was acquitted on the mail fraud charge, although the judgment as to him mistakenly states that he was convicted on this charge as well. Each defendant was sentenced to concurrent periods of incarceration of one year and one day on each count. Execution of the sentences has been stayed pending this appeal.

For the reasons below, we affirm the convictions.

FACTS

Defendants were four of the approximately eighty New York City marshals appointed by the Mayor of the City of New York as officers of the City's Civil Court, who are empowered, inter alia, to enforce judgments issued by

that court. As part of the enforcement function, each marshal, upon request of a Civil Court judgment creditor, may levy upon and sell at publicly advertised auctions the property of a Civil Court judgment debtor.[1] The auctions are conducted either by the marshal himself or by an auctioneer hired by the marshal. After a sale the marshal is entitled to deduct certain statutorily authorized fees[2] and must remit the remainder of the proceeds, up to the amount of the judgment, to the attorney for the judgment creditor; any proceeds in excess of the judgment debt and statutory fees are to be remitted to the judgment debtor.

In 1976 an investigation was begun into the bona fides of the marshals' auction sales. New York City Department of Investigation Detective Edward Gruskin assumed an undercover identity and began attending auction sales as a cash buyer. The investigation culminated in a 25-count indictment in 1978 against eleven marshals, including the four appellants, and two auctioneers for various violations of federal law on account of sales of debtors' property at artificially deflated prices. Seven of the marshals and both auctioneers pleaded guilty to certain offenses,[3] leaving only Angelilli, Butler, Irish, and Ribotsky to be tried. Each of the four defendants was

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1 The marshals' duties also include executing commercial and residential evictions and sending out collection letters on unsatisfied judgments. There was testimony at trial that some marshals concentrated in these areas and did not execute on property.

2 Marshals are paid neither salary nor expenses. Their lawful compensation comes solely from fees as allowed by statute, deducted from the proceeds of the sales of debtors' property.

3 In addition, five auctioneers who were not named in the indictment but were among those later identified by the government as unnamed coconspirators pleaded guilty to charges relating to these activities; and one similarly identified auctioneer was convicted, following a jury trial, of obstructing justice by giving false and evasive answers to the grand jury investigating these activities. *See United States v. Kanovsky*, 618 F.2d 229 (2d Cir. 1980).

charged in four counts: (1) participating in the affairs of the Civil Court through a pattern of racketeering (RICO § 1962(c)); (2) conspiring to so participate (RICO § 1962(d)); (3) extortion under color of official right; and (4) mail fraud. The indictment alleged that the pattern of racketeering activity included multiple acts of extortion and mail fraud; as the case went to the jury the indictment alleged with specificity ten extortionate transactions and five fraudulent mailings by Angelilli, eight extortionate transactions and four fraudulent mailings by Butler, nine extortionate transactions and four fraudulent mailings by Irish, and four extortionate transactions and three fraudulent mailings by Ribotsky. The conspiracy count charged a conspiracy among the four defendants, nine named but unindicted coconspirators, and certain unnamed coconspirators; pretrial disclosure by the government revealed the names of twenty-nine persons in the last category.

A. *The Prosecution's Evidence*

Since only limited attacks are made on the sufficiency of the evidence produced at the five-week, 57-witness trial, a summary will suffice here. The prosecution's evidence consisted principally of the testimony of one of the former marshals who had been indicted and had pleaded guilty to a misdemeanor, the testimony of Detective Gruskin, together with certain tape recordings made by him of conversations at various auctions, and the testimony of about a dozen buyers, several of whom had also been auctioneers for various marshals including one or more of the defendants and all of whom were alleged to have been coconspirators. The witnesses presented the following picture.

Two groups of persons were aligned in the auction frauds: the marshals, acting either directly or through their auctioneers, and a group of 20-30 buyers, known by those who frequented the marshals' sales as "the boys." "The boys," who regularly attended the sales, were also referred to by the marshals as "the 40 thieves." Usually one or more of the "the boys" would meet prior to the auction with the marshal who had advertised the auction; they would agree at that time on a deflated price at which the property would ostensibly be sold, and on an amount over the ostensible sales price that "the boys" would pay to the marshal. The latter amount was known as "top money" or "money on top." Sometimes the amount of top money paid was greater than the amount paid at the sham auction.

"The boys" acted in two ways to keep the bidding within the bounds agreed on with the marshals. First, they acted as a coordinated group at the auction to eliminate competitive bidding among themselves at that stage. This united action was called a "kipper." Second, "the boys" attempted in varous ways to discourage outsiders from bidding on the property. These methods consisted principally of misrepresentations as to the existence of liens on the property to be auctioned. After a sham auction "the boys" would hold their own private auction, called a "knockout," at which the property might be sold for as much as twice the amount paid at the marshal's auction. The starting price in the knockout was the total of the sham auction price plus the top money, and the difference between this total and the final knockout price was distributed by the knockout winner to the rest of "the boys." The bids at the knockout often were made in terms of so many dollars per participant rather than in terms of a total price.

Following the marshal's auction, the marshal would send a check to the attorney for the judgment creditor, purporting to represent the price at which the property had been sold at the auction. Needless to say, the checks did not include the "top money" received by the marshal. Butler, Irish, and Ribotsky stipulated that, as to each of the alleged fraudulent mailings attributed to them in the indictment, the checks were sent through the United States mails to attorneys for judgment creditors who regularly did business in interstate commerce.

Detective Gruskin and each of the buyers and auctioneers who testified provided considerable detail as to auctions at which marshals demanded top money. There was evidence as to thirty such transactions which were listed in the indictment as incidents of substantive violations of law; and there was testimony as to some sixteen other transactions, admitted as evidence of other overt acts in furtherance of the conspiracy.

In addition, there was evidence that the practice of demanding top money was pervasive among those marshals who engaged in property executions. All seven of the auctioneers who testified admitted that they had demanded and received top money on behalf of the marshals for whom they conducted auctions, who included not only the four defendants but many other alleged coconspirators. Manuel Ortiz, the former marshal who testified, also admitted having demanded top money. He and all of the buyers and auctioneers testified that it was the custom and practice among marshals at auctions to demand top money. Many of the buyers stated that they had learned about top money at the first marshal's sale they attended; some testified that they had heard about the practice long before, from their fathers who were auctioneers. Ortiz described the practice as a com-

mon topic of conversation among marshals on the occasions of their monthly Marshals' Association meetings or whenever they would get together. He testified that he had discussed the practice with many marshals, including the four defendants on many occasions, and that experienced marshals routinely "educated" newly appointed marshals on the practice.[4] He himself had educated Butler, who had asked how to go about getting money on top.[5]

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4 Ortiz testified in part as follows:

Q Was there a custom and practice in the industry during the years you were a Marshal, namely, from '71 to '78 of a Marshal being paid money on top?

A Yes, sir.

Q And did you personally engage in that conduct?

A Yes.

Q And can you tell us how often you did that, sir?

A For the past three and a half years as a Marshal, I used to conduct sales on a weekly basis, but they would show up every two weeks at my sales.

Q When you say they—

A The 40 thieves.

Q And on those occasions, did you take money on top?

A Yes.

Q Now, did there come a time, sir, that you had conversations with any other Marshal with respect to that practice of taking money on top?

A Yes, I did.

Q And can you tell us, sir, who the other Marshals were that discussed this custom and practice with you?

A You could start out with Pete, Bill, Don.

Q Would you identify them by full names? When you say Pete, who do you mean?

MR. ROSENTHAL: Identification conceded.

A With Butler, Don Irish and Don Ribotsky.

Q And you discussed that practice with these individuals?

A Yes, once in a while.

Q Who else did you discuss it with at—

A Lester Kasper, George Rivera, various other Marshals.

THE COURT: Where would you discuss these matters?

THE WITNESS: At—we used to hold a meeting of the Marshal's [*sic*] Association at least once a month and downstairs in the lounge, we'd get to together before the meeting and talk about things that went on.

(Tr. 2142-43.)

B. *The Defense Case*

The defendants called some three dozen witnesses to refute the charges against them. Butler testified in his own behalf, denying that he had ever accepted any "top

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Q Did there come a time that you did have a conversation with Mr. Ribotsky about this practice?

A Yes.

• • •

Q On that occasion, sir, what did Mr. Ribotsky say to you and what did you say in return?

A He asked me to use Robert Rappaport as an auctioneer for my sales.

Q Did he indicate why he was using him?

A I would get a better break from hikm [*sic*] with respect to top money.

Q Did he indicate whether he was using Mr. Rappaport at that time?

A I believe he was.

Q When you [s]ay you'd get a better break with respect to top money, was anything further said by Marshal Ribotsky at that time?

A I don't recall.

Q At this time you were a new marshal, is that correct?

A Yes.

Q Did you have similar conversations with marshals other than Mr. Ribotsky and Mr. Kasper?

A Yes.

Q Who did you have those conversations with?

A I had them with—with respect to using auctioneers?

Q Yes.

A With Peter Angellili [*sic*], Don, and Bill Butler and Karic.

Q Any other marshal that you spoke to, sir?

A Rivera Ponte, all the marshals that handle executions.

Q Do you recall at the time you had the conversation with Mr. Butler what was said?

A With Mr. Butler?

Q Yes.

A Well, Mr. Butler took over my office so I had to go over all the procedures with him.

Q When you say the procedures, did you go over the regulations?

A Over the regulations and how the operation of the office was to take place.

Q Did you have any conversation with him about using an auctioneer?

A Yes.

Q Can you tell us what you said to him and he said to you?

money," and indeed denying that he had ever heard the term before the commencement of trial. Irish testified to the same effect, and added that he was hard of hearing.

A At that time I told him to use Walter Jacobson, that he would get a fair shake.

Q Did you explain to Mr. Butler the purpose of using the auctioneer?

A Yes. You use the auctioneer to put a buffer between you and any ensuing investigation that comes up because the auctionner [*sic*] is the one that deals with these buyers.

(Tr. 2146-48.)

Q During the time frame you were a marshal can you describe the custom and practice that was engaged in with respect to money on top?

What happens at sales?

A You would advertise the [s]ale, and the buyers would show up, they would come in and they would look at the merchandise and if they liked it they would come over to you and sometimes they would tell you what they would give you and how much top money they'd give you.

If they didn't like it they'd say, all you have is crap over here and we'll only give you so much, take it or leave it.

Sometimes if we knew the merchandise was pretty good we'd approach them and say we w[an]t so much for this and then we'd sell it, the hammer would come down at that particular price.

Q At a pre-agreed price?

A Yes.

Q Were there occasions where the auctioneer handled the entire deal for you?

A Yes.

Q On those occasions did you have anything to do with the men you referred to as the 40 theives [*sic*]?

A All I had to do w[i]th them is convey my prices to the auctioneer and maybe he would go outside and give it to them.

Q And was it the custom and practice that the auctioneer would return to the marshal and explain as to whether it had been agreed to?

A Yes, agreed or disagreed.

Q And following the agreement then the auction would be conducted?

A Yes.

Q You as a marshal would be advised what the deal was?

A Yes.

Q And you ultimately approved the sale going forward?

A Yes.

(Tr. 2149-50.)

Angelilli did not testify, but called twelve witnesses who stated that they never noticed any unlawful goings-on, and that the prices paid at Angelilli's auctions were fair. Ribotsky (who also did not testify), Butler, and Irish called a total of twenty-one witnesses who testified to their respective good character.

C. *The Verdicts*

The jury was asked to return a general verdict as to each of the defendants on each count. In addition, as to each specific transaction or mailing alleged under the racketeering, extortion, and mail fraud counts, the jury was asked to state specifically whether or not it was proved beyond a reasonable doubt.

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5 Q I believe you told us you got to know Marshal Butler for the first time in 1974 or '75?
A Yes.
Q Is that right?
A 1974.
Q Let us start with 1974.
A Okay.
Q All right.
What is the first time at a marshals' meeting that you recall discussing top money in the presence of or with Marshal Butler?
A The first time?
Q Yes.
A Exact date?
Q No. Approximate date will do. Some time in what, '74, was it?
A '74 or '75 when I discussed it with Marshal Butler.
Q That was discussed at a Marshal's [*sic*] meeting; is that right?
A That's correct.
Q And you said to him, you know there is such a thing as top money; is that right? Is that what you said?
A No. It was common knowledge with all the Marshals, that this was going on.
Q Well, what was discussed if that was common knowledge?
A He wanted to know how you went about it.
Q Marshal Butler sometime in '74 or '75 asked you how you go about dealing in top money; is that right?
A That's right.

(Tr. 2216-18.)

The jury found Butler, Irish, and Ribotsky guilty on all four counts. It found Angelilli guilty on the two RICO counts and the extortion count, but acquitted him of the mail fraud count. With respect to the individual transactions alleged, the jury found as follows: as to Angelilli, six out of the ten alleged extortionate transactions were proved, and none of the five alleged mail fraud transactions was proved; as to Butler, six of the eight alleged extortionate transactions and all four alleged mail frauds were proved; as to Irish all nine alleged extortionate transactions and all four alleged mail frauds were proved; and as to Ribotsky, three of the four alleged extortionate transactions and all three alleged mail frauds were proved.

DISCUSSION

On appeal defendants make numerous challenges to their convictions. Chief among these are the contentions (1) that the RICO statute does not apply to the activities of officials of the New York City Civil Court, (2) that their activities had insufficient impact on interstate commerce to trigger application of RICO or the Hobbs Act, (3) that their uses of the mails were not for the purpose of defrauding within the meaning of the mail fraud statute, and (4) that the admission of evidence as to the custom and practice of City marshals to demand top money was error.[6] We find no merit in the first three contentions. As to the fourth we conclude, on the basis of the record as a whole, that any error regarding the admission of the challenged testimony was not prejudicial.

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[6] We have examined all of defendants' contentions and find them unpersuasive. The contention that the recitation in the indictment of several acts of extortion or several acts of mail fraud in a single count

A. *The Civil Court as a RICO Enterprise*

RICO § 1962(c) provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "Enterprise," as used in § 1962(c) is defined as follows:

> 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity; . . . .

18 U.S.C. § 1961(4). The enterprise in whose activities defendants are alleged to have participated through a

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was impermissibly duplicitous, was waived, *United States v. Viserto*, 596 F.2d 531, 538 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979), and is in any event lacking in merit since no prejudice has been shown, *see United States v. Murray*, 618 F.2d 892, 896-97 (2d Cir. 1980). Ribotsky's contention that a cassette recording of a particular transaction was played for the jury during its deliberations although the cassette had not been admitted into evidence may be technically correct, but any error was clearly harmless. The recording played for the jury was a copy of a tape that had been admitted into evidence, the transcript of which had also been admitted into evidence; Ribotsky has pointed to no significant differences between the admitted tape and the cassette copy. Finally, given the many witnesses who testified to Ribotsky's receipt of top money, Ribotsky's arguments that he was merely a peripheral defendant whose case should have been severed, and that there was insufficient evidence to convict him, are frivolous.

pattern of racketeering,[7] is the New York City Civil Court. Defendants contend that governmental units such as the Civil Court are not enterprises within the meaning of RICO.[8] We disagree.

We begin with the language of the statute. On its face, the definition of "enterprise" is quite broad. We see no sign of an intention by Congress to exclude governmental units from its scope, *cf. United States v. Turkette*, 49 U.S.L.W. 4743 (U.S. June 17, 1981) (construing "enterprise" to include illegal as well as legitimate ventures), and we note three pertinent aspects of the definition that suggest an expansive rather than a restrictive thrust. First, the term "enterprise" is defined to "include[ ]" the entities listed thereafter. The use of the word "includes," rather than a more restrictive term such as "means," "indicates that the list is not exhaustive but merely illustrative." *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979). *See also* 2A C. Sands, *Sutherland on Statutes and Statu-*

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7 A "pattern of racketeering activity" consists of at least two predicate acts within a ten-year period. 18 U.S.C. § 1961(5). Predicate acts include any act or threat of murder, kidnaping, gambling, arson, robbery, bribery, extortion, or narcotics dealing, which is punishable under state law by imprisonment for more than one year, and include any of a large number of violations of federal statutes including the Hobbs Act and the mail fraud statute.

8 Defendants argue also that RICO does not apply because the activities of the Civil Court, which is an instrumentality of the City of New York, lack the requisite impact on interstate commerce. Under § 1962(c) the activities of the enterprise need only "affect" interstate commerce, and even a slight effect will suffice. *See, e.g., United States v. Barton*, No. 80-1096, slip op. 2149, 2166 (2d Cir. March 27, 1981), and cases cited therein; *United States v. Mannino*, 635 F.2d 110 (2d Cir. 1980). In the present case this requirement is easily satisfied by the fact, stipulated by all defendants, that "individuals and corporations who regularly engage in interstate commerce, appear as litigants in the Civil Court of the City of New York."

tory Construction 82 (4th ed. 1973) ("A term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means' "). Second, the use of the word "any" indicates an intent to make the list all-inclusive. The inclusion of "any individual," "any . . . partnership," "any . . . corporation," and so forth, belies an intention to distinguish, for example, between individuals having differing statuses, or between general and limited partnerships, or between business and municipal corporations. Finally, the word "entity" itself is hardly restrictive. It denotes anything that exists. As modified by the word "legal," it suggests that any being whose existence is recognized by law is within the term "enterprise." We conclude that on its face the definition of an enterprise to "include[ ] any . . . legal entity" is unambiguously broad, and that it does not exclude the Civil Court.[9]

This conclusion is bolstered by certain of RICO's substantive goals, which appear to be directed particularly toward governmental entities. For example, "racketeering activity" is defined in § 1961(1) to include bribery, obstruction of justice, and obstruction of State or local law enforcement. The administration of justice and the enforcement of the law are obviously governmental

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9 We find no merit in defendants' argument that because RICO contains a definition of "State," 18 U.S.C. § 1961(2), the definition of "enterprise" excludes states and their instrumentalities because it does not specifically refer to states. The conclusion does not follow from the premise. If one definition is broad enough to overlap part of another, specific reference is pro tanto unnecessary. There obviously is some overlap among the definitions, and no effort to cross-reference. For example, "person" is defined to "include[ ] any individual or entity capable of holding a legal or beneficial interest in property," 18 U.S.C. § 1961(3); the definition of enterprise refers to individuals and entities, although not to persons.

functions, and bribery is "a crime which is peculiar to public officials, including judges." *United States v. Vignola*, 464 F. Supp. 1091, 1096 n.12 (E.D. Pa.), *aff'd*, 605 F.2d 1199 (3d Cir. 1979) (table), *cert. denied*, 444 U.S. 1072 (1980). Section 1961(1) also includes reference to the Hobbs Act, 18 U.S.C. § 1951, which prohibits extortion "under color of official right." Extortion under color of law is a crime which "can only be committed in the context of governmental activity." *United States v. Sisk*, 476 F. Supp. 1061, 1062 (M.D. Tenn. 1979):

> At common law and under most statutes, bribery is limited to a payment given in exchange for the exercise of governmental power. Extortion under color of law is the use of governmental power to force an involuntary payment from another. By making bribery and extortion RICO offenses, Congress must be said to have understood that these offenses would be committed by governmental officials as a part of their work. Since these offenses can only be committed in the context of the work of a governmental agency, Congress must be taken to have intended that a governmental agency could be one of the types of "enterprises," the affairs of which are conducted through a pattern of racketeering offenses. The connection between the named offenses of bribery and extortion and governmental work is too close to say that government work is not one of the kinds of activity that may constitute a RICO "enterprise."

Id.

Our interpretation of the language of the statute to extend to activities affecting governmental entities is

further supported by the purpose and legislative history of the Organized Crime Control Act of 1970 (the "Act"), Pub. L. No. 91-452, 84 Stat. 922, of which RICO is Title IX. The overriding purpose of the Act, as reflected in Congress's Statement of Findings and Purpose, was to deal with a widespread problem—the infiltration of organized crime into all areas of American life. While Congress was concerned principally with the relationship of crime to legitimate businesses, it does not appear that it intended to exclude the public sector from its assessment of the problem or its search for a cure:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, *and corruption*; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and *to subvert and corrupt our democratic processes;* (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, *threaten the domestic security, and undermine the general welfare of the Nation and its citizens;* and (5) organized crime continues to grow because of defects

in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

84 Stat. 922-23 (emphasis added). Congress's concern about the infiltration of local governmental units had surfaced repeatedly in the debates on portions of the Act other than the RICO title. *See* comments in the Senate, e.g.: "More important, these criminals have, in some localities, established corrupt alliances within the processes of our democratic society: with the police, prosecutors, courts, and legislatures." 116 Cong. Rec. 586 (remarks of Sen. McClellan); "East of the Mississippi, particularly, it is the rare big-city government that is completely free of the fix." 116 Cong. Rec. 596 (reprinting *Time Magazine* cover story of August 22, 1969); "Corrupt officials and bribed law enforcement officers operate as 'a silent conspiracy' in support of organized crime. The syndicate could not continue to operate without corrupt judges and prosecutors, or without the assistance of a handful of bribed police." 116 Cong. Rec. 601 (remarks of Sen. Hruska); *see also* Senate Judiciary

Committee Report's discussion of Title VIII of the Act, the provisions aimed at syndicated gambling: "Finally, Congress finds that corruption and bribery of State and local officials responsible for enforcement of criminal laws facilitate illegal gambling enterprises." S. Rep. No. 617, 91st Cong., 1st Sess. 73 (1969). Similar views were aired in the House of Representatives, e.g.: the Act "places in the hands of the prosecution a number of necessary weapons in order to deal with the sophisticated operations of organized crime—including its connections with many public officials." 116 Cong. Rec. 35203 (remarks of Rep. McClory); "organized crime teaches the lesson that the law is for sale and that the road to success is to follow the path of corruption." 116 Cong. Rec. 35216 (remarks of Rep. McDade). Although the congressional discussion devoted expressly to Title IX did not state that governmental entities were to be the beneficiaries of RICO's substantive provisions, neither was there any statement that those entities were to be excepted. And of the three titles of the Act that create substantive offenses, RICO manifestly has the greatest substantive scope, and hence the greatest potential for dealing with corruption: the other two titles deal solely with illegal gambling activities (Title VIII), and with the importation, distribution, and storage of explosive devices (Title XI).

In sum, we view the language of § 1961(4), defining enterprise, as unambiguously encompassing governmental units, and we consider that the purpose and history of the Act and the substance of RICO's provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public or governmental entities. We note that this view is shared by virtually every other court that has considered the question. *See, e.g.*,

United States v. Altomare, 625 F.2d 5, 7-8 (4th Cir. 1980) (county prosecutor's office); *United States v. Karas*, 624 F.2d 500, 504 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 857 (1981) (county law enforcement officials); *United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980) (County Attorney); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980) (county sheriff's department); *United States v. Grzywacz*, 603 F.2d 682, 685-87 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) (police department); *United States v. Frumento*, 563 F.2d 1083, 1089-92 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978) (Pennsylvania Bureau of Cigarette and Beverage Taxes); *United States v. Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (police department); *United States v. Sisk, supra*, 476 F. Supp. at 1062 (state governor's office); *United States v. Salvitti*, 451 F. Supp. 195, 199 (E.D.Pa.), *aff'd*, 588 F.2d 824 (3d Cir. 1978) (table) (Redevelopment Authority of the City of Philadelphia); *United States v. Vignola, supra*, 464 F. Supp. at 1095-98 (Philadelphia Traffic Court).[10]

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[10] The only contrary decision of which we are aware is *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976) *("Mandel")*, *aff'd on other grounds en banc by an equally divided court*, 602 F.2d 653 (4th Cir. 1979), in which the district court dismissed a count of an indictment on the ground that a state could not be a RICO enterprise. The government did not appeal the dismissal of that count. Subsequently, however, in *United States v. Baker, supra*, the Fourth Circuit specifically rejected the view of the district court in *Mandel*. The district court's decision in *Mandel* was relied on in the dissenting opinion in *United States v. Grzywacz, supra*, which contended that a police department could not be a RICO enterprise. The defendants here rely on the latter opinion and *Mandel* in arguing that the principle of *ejusdem generis* requires an interpretation of "enterprise" that excludes governmental bodies. They argue that since the phrase "or other legal entity" is preceded by "individual, partnership, corporation, [or] association," the term "legal entity" must be deemed limited to one of "the common legal forms in which business entities and labor groups fashion themselves to carry out their private function." *United States v. Grzywacz, supra*, 603 F.2d at 691 (dissenting opinion), quoting *Mandel, supra*,

We find no merit in defendants' argument that the introduction in RICO of civil remedies such as divestiture and forfeiture of the defendant's interests in an enterprise compel the conclusion that governmental entities are not enterprises within the meaning of RICO. The fact that a convicted official will have no forfeitable property interest in a governmental unit does not suggest that that unit cannot be a RICO enterprise. As the Supreme Court stated recently in *United States v. Turkette, supra,* in rejecting a similar challenge to the inclusion of unlawful activities as RICO enterprises,

> [e]ven if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept. Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to

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415 F. Supp. at 1021. We find this argument unpersuasive since we believe the congressional intent appears clearly to the contrary. "The rule of *ejusdem generis* is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute." *United States v. Turkette, supra,* 49 U.S.L.W. at 4744. It is

> a useful tool of construction resorted to in ascertaining legislative intent. The rule should not be employed when the intention of the legislature is otherwise evident . . . . Nor should it be applied to defeat the obvious purpose of the statute or to narrow the targets of Congressional concern.

United States v. Frumento, supra, 563 F.2d at 1090.

For a similar reason we reject defendants' argument that the "principle of lenity" requires an interpretation that excludes governmental entities. The principle of lenity, like *ejusdem generis,* applies only where the statute is ambiguous. *United States v. Turkette, supra:*

> There being no ambiguity in the RICO provisions at issue here, the rule of lenity does not come into play . . . . ("The canon in favor of strict construction [of criminal statutes] . . . is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.") . . . .

49 U.S.L.W. at 4746 n.10 (citations omitted).

> argue that their existence limits the scope of the criminal provisions.

49 U.S.L.W. at 4745 (footnote omitted). To the extent that the remedy of forfeiture might be invoked to remove a defendant from his official position, we do not see its application as impermissibly altering sensitive federal-state relationships, by "displac[ing] the State's freedom to structure integral operations in areas of traditional governmental functions." *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). "In most instances, the issue would be moot since convicted felons are usually removed from office automatically." Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. of Crim. Law & Criminology 1, 13 n.108 (1978).

Nor do we find persuasive the argument that if the term "enterprise" is broad enough to include the New York Civil Court it would also be broad enough to include a federal court or other federal agencies, and that such a result could not have been intended in view of the many provisions in the Criminal Code dealing with corruption of federal officials. The existence of other provisions is not a persuasive argument for construing "enterprise" so narrowly. RICO was not intended to supplant these provisions. Section 904(b) of Title IX, 84 Stat. 947, provides that

> [n]othing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

RICO contemplates an overlap with other provisions of the Criminal Code. An essential element of a RICO

violation is the commission of two or more predicate acts, all of which are crimes under state or federal law, 18 U.S.C. § 1961(1), and a defendant may be punished separately for the RICO violation and the predicate crimes. *E.g., United States v. Boylan,* 620 F.2d 359, 361 (2d Cir.), *cert. denied,* 101 S. Ct. 103 (1980). The Act expressly sought to establish new penal prohibitions, and to provide enhanced sanctions and new remedies. 84 Stat. 923. And RICO was intended to augment other provisions of the criminal law, and not to limit or be limited by them. *See United States v. Barton,* No. 80-1096, slip op. 2149, 2171-76 (2d Cir. March 27, 1981).

B. *Hobbs Act Jurisdiction*

The Hobbs Act provides that it is unlawful to "affect[ ] commerce . . . by . . . extortion." 18 U.S.C. § 1951(a). Extortion is defined in pertinent part as "the obtaining of property from another, with his consent, induced . . . under color of official right." 18 U.S.C. § 1951(b)(2). Each defendant was alleged to have affected commerce by obtaining "top money" from "the boys" under color of official right. Defendants contend that the government failed to prove that the taking of top money affected commerce. Angelilli argues in addition that there was no proof that any of the four "boys" from whom he was proven to have received top money was engaged in commerce. To the contrary, we find adequate evidence to support a conclusion that commerce was affected.

The jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. *See United States v. Gambino,* 566 F.2d 414, 418 (2d Cir. 1977), *cert. denied,* 435 U.S. 952 (1978). Even a potential or subtle effect on commerce will suffice. *See United States v. Augello,* 451 F.2d 1167, 1170

(2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972); *United States v. Calder*, 641 F.2d 76, 78 (2d Cir. 1981); *United States v. Tropiano*, 418 F.2d 1069, 1076-77 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). In *Calder*, for example, we found the requisite impact on interstate commerce in the extortion of $300 per week from a restaurant that had no liquor license, but that purchased de-alcoholized wine from a Canadian company.

In the present case there was ample evidence that many of "the boys" did business in interstate commerce. They purchased goods from out-of-state buyers and resold in New York; they purchased in New York, advertised in the *New York Times* (which the district court took judicial notice is circulated outside of New York), and sold to buyers from outside the state.

As for Angelilli's individual contention, we note that one of the four persons who purchased from him testified that he sometimes sold to out-of-state buyers the merchandise he had bought at marshals' auctions. And in any event, since "the boys" acted as a unit in purchasing at the collusive price at the marshals' auctions, a marshal's sale to one of "the boys" who himself happened not to engage in interstate transactions would nevertheless have the required effect on interstate commerce since he was "kippered" with those who dealt interstate. The evidence of effect on commerce was sufficient as to all defendants to sustain the Hobbs Act convictions.

C. *Mail Fraud*

The mail fraud statute provides as follows:

> Whover, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

> pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, *for the purpose of executing such scheme or artifice or attempting so to do*, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (emphasis added). The government charged that defendants violated the mail fraud statute when, after rigging the auction prices of the judgment debtors' property and taking their "top money," they mailed to the judgment creditors' attorneys checks representing the proceeds of the sales, "falsely and fraudulently claiming that the remitted proceeds represented the amount received at the respective sales when in fact they had received additional 'money on top,' which fact was concealed from the judgment creditors." Butler, Irish, and Ribotsky, who stipulated that they mailed certain checks to attorneys who represented judgment creditors, were convicted of mail fraud.[11] They attack their convic-

[11] While Angelilli stipulated that the checks drawn by him and listed in the indictment represented money realized from his auction sales and

tions by arguing that because they had already received their top money before the checks were mailed, their mailings were, as a matter of law, not for the purpose of executing the schemes to defraud. This contention cannot be sustained.

The evidence at trial revealed two respects in which the jury could have found that in fact the mailings were for the purpose of executing the fraudulent schemes. First, the mailings themselves were fraudulent. They represented to judgment debtor and creditor that the property levied on had been sold at a certain price; in fact the collusion between the marshal and "the boys" had resulted in a fraudulently low price, and even the immediate out of pocket cost to the buyers was not revealed, because the "top money" was not reflected in the mailings. In addition, the transmitting of checks representing the proceeds of the sale was a necessary step in executing the schemes because it was designed to lull the debtors and creditors into believing that the defendants had duly sold the property at auction. Had no checks been sent, or had the truth been revealed as to the amount for which the property was sold, the schemes would have failed.

Under the pertinent authorities, it is clear that the defendants' mailings were within the purview of the mail fraud statute. *See United States v. Sampson*, 371 U.S. 75, 80 (1962); *United States v. Pereira*, 347 U.S. 1 (1954). In *Sampson*, the defendants represented that they could help businessmen either to sell their businesses or to obtain loans. Defendants' salesmen received fees from the victims which they converted to cashiers' checks and mailed

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were made payable to attorneys for judgment creditors, he refused to stipulate to having used the mails. The government sought to prove at trial that Angelilli had mailed these checks, but the jury acquitted him of this charge.

to the defendants' regional offices, which in turn mailed form acceptance letters to the victims. The district court dismissed the indictment on the theory that the fraud was complete when the victims paid the fees. The Supreme Court reversed, holding that the

> defendants' scheme contemplated from the start the commission of fraudulent activities which were to be and actually were carried out both before and after the money was obtained from the victims. The indictment specifically alleged that the signed copies of the accepted applications and the covering letters were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. We cannot hold that such a deliberate and planned use of the United States mails by defendants engaged in a nationwide, fraudulent scheme in pursuance of a previously formulated plan could not, if established by evidence, be found by a jury under proper instructions to be "for the purpose of executing" a scheme within the meaning of the mail fraud statute.

371 U.S. at 80-81. *See also United States v. Ashdown*, 509 F.2d 793, 800 (5th Cir.), *cert. denied*, 423 U.S. 829 (1975) (mailing of stock certificates and confirmations of stock purchases are sufficiently connected to scheme to constitute mail fraud: "post-purchase mailings which are designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are mailings in furtherance of the scheme."); *United States v. MacClain*, 501 F.2d 1006, 1011-12 (10th Cir. 1974). Such "lulling" mailings are essential to the fraudulent schemes in cases like *Sampson* and the present one, where the frauds are "not isolated and unrelated

swindles," *Bliss v. United States*, 354 F.2d 456, 458 (8th Cir.), *cert. denied*, 384 U.S. 963 (1966) (defendant mailed a few initial payments to victim-investors while simultaneously seeking other victims), and where "the scheme continues and repeats over an extended period of time." *United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979) (mails used as part of continuing scheme to obtain federal grants from which defendant took kickbacks).

Defendants' reliance on the Supreme Court's decisions in *United States v. Maze*, 414 U.S. 395 (1974); *Parr v. United States*, 363 U.S. 370 (1960); and *United States v. Kann*, 323 U.S. 88 (1944), is misplaced. In each of those cases, the fraud was complete prior to the mailing, in that the defendant had already received all of the purloined property or services and had no further communication with the defrauded party. In *Kann*, for example, the fraud alleged involved diversion of funds from one corporation to a dummy corporation; the scheme was completed when the phony checks were cashed, and the funds received, by the defendants. The alleged mailings were made by the check-cashing bank, to collect from the drawee bank. Although the defendants initiated this chain of events, the mailing was held entirely unnecessary to their scheme. In *Maze*, the defendant had charged food and lodging on a stolen credit card. The fact that the merchants later mailed a bill to a bank, which in turn mailed a bill to the card's rightful owner for payment, was held incidental—and indeed counterproductive—to the scheme.

In the present case, given the defendants' own need to communicate with the victims of their fraud, and to make fraudulent representations in those communications, we conclude that the mailings were made for the purpose of executing a scheme within the meaning of the mail fraud statute.

D. *Evidence of Custom and Practice*

We turn finally to the defendants' challenge to the prosecution's evidence that the demand and acceptance of top money was a regular custom and practice of the New York City marshals.[12] The defendants contend that the admission of such evidence was error and was highly prejudicial to them. For the reasons that follow, we find no basis for reversal.

The government elicited testimony from no fewer than 13 witnesses—all of the buyers, all of the auctioneers, and former marshal Ortiz—that it was the custom and practice of marshals to demand, either directly or through their auctioneers, money on top. The rationale on which this evidence was offered and received is not wholly unobscured. When the prosecutor posed the first custom and practice questions early in the trial, the district court allowed the testimony as "background," instructing the jury at that time that "it does not bind any defendant. This is just background as to what happens if you believe his testimony in the cases where there are fraudulently conducted sales." (Tr. 241.) Despite mention of a different rationale shortly thereafter in the absence of the jury,[13]

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12 Testimony was elicited with respect to certain other customs and practices as well, including the related custom and practice of "the boys" to discourage outsiders, and certain ministerial customs relating to the signing of the bill of sale after an auction. The custom and practice with which we deal on this appeal is that of the marshals' demanding money on top.

13 On the following day, the court appeared to rule, in the absence of the jury, that this custom and practice testimony was admissible to show the marshals' awareness of wrongdoing:

> The reason I am permitting custom and practice in the trade is because if the Government can show that there was a custom and practice in the trade, and that that custom and practice involved fraudulent auction sales, because they were involved in the trade,

the court several days later in effect reiterated its first instruction during the custom and practice testimony of another buyer: "this is not direct evidence against any defendant, except as the witness indicates that a particular accused participated in it." (Tr. 1094.) Toward the end of the government's presentation of this type of evidence, however, the court informed the jury as follows: "I am admitting evidence on custom and practice because you may from the custom and practice and all the other evidence infer that the defendants engaged in the general custom and practice . . . . " (Tr. 2060-61.)

Nevertheless, by the time the jury was to be charged at the close of the evidence and summations, the district court had revised its view of the proper role of the custom and practice evidence: it instructed the jury that custom and practice evidence could be used only for the limited purpose of assessing whether the government had proven the existence of a conspiracy as charged in Count I of the indictment. The court instructed the jury that neither the custom and practice testimony, nor the evidence of top money demands other than those specifically alleged in the indictment against the four defendants could be used

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the jury from that may infer that they are aware of what they were doing and the specific acts—

(Tr. 412.) The government argues on appeal that the evidence was admissible with respect to the state of mind of the *buyers*, an issue for Hobbs Act purposes. Several of the buyers testified in effect that paying top money was the only way to do business at marshals' auctions because the practice was so widespread; if they did not ante up they could not buy in the future from this marshal, and to buy in the future from other marshals would require payment of top money to the latter. *See, e.g., United States v. Kennedy*, 291 F.2d 457 (2d Cir. 1961). Although this rationale has some merit it does not appear to have been articulated clearly during the trial, and it does not appear that the jury was ever instructed that it could consider the custom and practice testimony for this purpose. Indeed, the court's closing charge was to the contrary. *See infra*.

to prove that the defendants committed any of the substantive crimes charged:

> Now, there was evidence of sales that were not charged in the indictment. Evidence came before you on the custom and practice among marshals in conducting sales, just generally among what was called the business of selling judgment-debtor assets. The evidence of sales that were not charged in the indictment may only be used in determining whether the government established the existence of the conspiracy charged and for no other purpose. The evidence of custom and practice in the conduct of marshals' sales may be considered in determining whether the conspiracy charged was established. It is limited to such use and it may not be considered in determining whether the accused committed the other crimes charged in the indictment.

(Tr. 4847.) The substance of this instruction was repeated in response to the jury's request, shortly after it retired to deliberate, for clarification of "what constitutes conspiracy." The clarification included the following:

> You can take into consideration all the statements made by all the alleged conspirators to determine whether the government proved such a conspiracy. You can take into consideration proof of custom and practice, and as I said, that evidence is solely on the issue as to whether there was such a conspiracy.

(Tr. 4907.)

Defendants argue that the admission of the custom and practice evidence was barred by Fed. R. Evid. 404(b) because that evidence referred to other acts and was

designed to show that the defendants acted similarly. We agree with the district court's final analysis that the custom and practice testimony was admissible for a limited purpose. Such testimony could properly be considered in determining whether or not the government had proven the existence of a broad conspiracy among marshals to demand top money, as alleged in the indictment, but it could not be considered in reaching a finding as to whether or not any of the defendants themselves demanded or received top money. The key to both conclusions is the scope of Rule 404(b).

Rule 404(b) provides as follows:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To the extent that the evidence related to acts other than those charged, it was admissible under the second sentence of Rule 404(b) to show a continuous plan. Insofar as the evidence, on the other hand, reflected a custom and practice that was part of the alleged conspiracy itself, it was not inadmissible under the first sentence of the Rule because the conduct did not represent *other* acts. *See, e.g., United States v. Carroll,* 510 F.2d 507, 509 (2d Cir. 1975), *cert. denied,* 426 U.S. 923 (1976); 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5239 (1978):

> In cases where the incident offered is part of the conspiracy alleged in the indictment, the evidence is

> admissible under Rule 404(b) because it is not an "other" crime. The evidence is offered as direct evidence of the fact in issue, not as circumstantial evidence requiring an inference as to the character of the accused.

Id. at 450 (footnote omitted).

Since the acts were part of the conspiracy, evidence of their occurrence was admissible to prove the conspiracy, regardless of whether they were performed by the defendants or by other coconspirators. *See, e.g., United States v. Araujo,* 539 F.2d 287, 289 (2d Cir.), *cert. denied,* 429 U.S. 983 (1976); *United States v. Papadakis,* 510 F.2d 287, 294-95 (2d Cir.), *cert. denied,* 421 U.S. 950 (1975); *United States v. Costello,* 352 F.2d 848, 854 (2d Cir. 1965), *rev'd on other grounds,* 390 U.S. 39 (1968); *United States v. Bates,* 600 F.2d 505 (5th Cir. 1979); *United States v. Vega-Limon,* 548 F.2d 1390 (9th Cir. 1977); 22 C. Wright & K. Graham, *supra,* § 5239, at 451. In *Papadakis,* for example, we approved the receipt of evidence, to prove the existence of the conspiracy, that on several occasions not charged in the indictment the defendant and others conducted themselves in a manner similar to that charged. And in *Costello,* we stated that

> the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to be linked by quite separate proof.

352 F.2d at 854. Even acts prior to the first act alleged in the indictment may be proven to show the continuing nature of the conspiracy. *Id.*

We see no error in the district court's receipt of evidence as to some of the conspiratorial acts in a somewhat

generalized form. For example, rather than detailing each of the top money demands they had made or witnessed as auctioneers and/or buyers over the years, the witnesses generally testified as to how many marshals' auctions they had attended in those capacities, and estimated in what percentage of those cases top money had been demanded. It was within the district court's discretion, after assuring itself that such evidence was based on personal knowledge, *see* Fed. R. Evid. 403, 602; *see United States v. Brown*, 548 F.2d 1194, 1198 n.13 (5th Cir. 1977), to permit the testimony to be given in that form. Likewise we find no error in the court's permitting these experienced witnesses[14] to draw expert inferences as to the existence of a custom and practice among marshals to demand top money. Their opinions were properly admitted under Fed. R. Evid. 702[15] to assist the jury in

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14 The experience of the witnesses ranged from that of buyer Barry Stampler, who had attended 250-300 marshals' auctions over a two-year period, to that of Nathan Weisser who had been an auctioneer for twenty-eight years.

15 Rule 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The court charged the jury that the testimony as to custom and practice was opinion testimony:

> Witnesses, as I indicated, were called to the stand. They testify only to what the witness saw or heard. There is an exception to that general rule. Witnesses who by reason of education and experience have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for that opinion.
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> For example, Dr. Ober was called to testify on Mr. Irish's hearing problems. Some witnesses testified that they were familiar with the custom and practice among marshals who were charged with the duty and who performed the duty of selling judgment debtors'

determining whether there was a broad-scale agreement among marshals to demand top money.

While we conclude that the custom and practice evidence was admissible for the purposes we have discussed, we agree with the defendants that Rule 404(b) barred its use to prove that the individual defendants acted in conformity with the custom and practice. The district court ultimately agreed with this view, as evidenced in his final and supplemental charges to the jury. But, as noted earlier, during the testimony of one buyer, the court had instructed the jury that it was permitted to infer from the custom and practice evidence that the defendants individually had engaged in the custom and practice. To the extent that the custom and practice evidence consisted of testimony as to a defendant's other acts, the interim instruction—which made no mention of plan, or knowledge, or any other use of the evidence permissible under the second sentence of Rule 404(b), but instead expressly permitted the inference that the defendant had acted as charged in the indictment—was contrary to the prohibition of the first sentence of Rule 404(b). This use of the other act evidence would require an inference that the other act showed the defendant's propensity to perform acts of that type, and a further inference, from that propensity, that the defendant therefore performed the act charged. *See* 22 C. Wright & K. Graham, *supra*, § 5239, at 460-61. Such a chain of inferences, even if the person who performed the other acts is the person whose

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assets. Because of their experience they could express an opinion as to custom and practice. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. You don't have to accept an expert's opinion at face value. The credibility of the opinions or the testimony of experts is judged like the testimony of any other witnesses.

(Tr. 4811.)

conduct is in issue, is logically so weak that the relevance of the factual evidence will nearly always be outweighed by the probable prejudice resulting from its admission. The logical weakness is the reason for the general prohibition of Rule 404(b):

> The basic reason for the inadmissibility of evidence of other crimes, wrongs, or acts is that such evidence is irrelevant to prove the conduct in question. As Wigmore says, it "has long been accepted in our law . . . [t]hat 'the doing of one act is in itself no evidence that the same or a like act was again done by the same person' . . . . " The reason for this is that our knowledge of the causes of human conduct is too weak to provide any major premise that will support the desired inference. . . .
>
> The only explanatory model for human conduct expressly recognized by the law of evidence is the concept of "character." But our confidence in this construct is so weak that its explicit use is only authorized under special circumstances.

22 C. Wright & K. Graham, *supra,* § 5239, at 436 (footnotes omitted).

Moreover, to the extent that the chain of reasoning requires an inference that the individual defendants committed certain acts based on evidence that other acts were performed by other persons, it is even more tenuous. In giving the interim instruction permitting such an inference, the court apparently relied on Fed. R. Evid. 406, which provides as follows:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is

> relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

We do not believe that this Rule authorized the interim instruction. We begin by noting that the challenged evidence concerned the custom and practice of marshals as a group rather than the "habits" of individual defendants. While various witnesses testified that one or more of the defendants had, on specific occasions, demanded and been paid top money, none testified that it was the habit of such defendant to do so. Thus, the interim instruction permitted the jury to infer conduct of an individual on the basis of the custom of an organization. It may be that the ambiguous structure of Rule 406—which does not link the conduct of a person expressly with proof as to the habit of that person, nor the conduct of an organization expressly with proof as to the routine practice of that organization, *see* 23 C. Wright & K. Graham, *Federal Practice and Procedure* § 5273, at 42 (1980)—was intended to make admissible the evidence of the practice of the organization to prove the conduct of any of its members. As a matter of policy, however, we cannot countenance that application of the Rule here, *see* 23 C. Wright & K. Graham, *supra,* § 5275, at 56, since it would defy the principle of the individuality of guilt to hold that a defendant's mere membership in an organization practicing a particular type of crime could be used to show that the defendant himself committed such a crime. We conclude that the district court's interim instruction, which allowed the jury to use the custom and practice evidence to infer that the defendants demanded top money, was incorrect.

The conclusion that there was error, however, does not end the inquiry, for the Judicial Code instructs us that an incorrect ruling does not require the reversal of a judgment if the error was "harmless":

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

28 U.S.C. § 2111 (1976). The leading criminal case construing the predecessor of § 2111 is *Kotteakos v. United States,* 328 U.S. 750 (1946), and its standards remain authoritative under the present provision. *United States v. Frank,* 494 F.2d 145, 161 n.19 (2d Cir.), *cert. denied,* 419 U.S. 828 (1974). In *Kotteakos,* the Supreme Court pointed out that in evaluating whether an error was harmless an appellate court is not to determine guilt or innocence, nor to speculate upon probable reconviction. 328 U.S. at 763. Rather, it is to determine, "in relation to all else that happened,"

> what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Id. at 764.

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of

> Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 764-65 (footnote and citations omitted).

After a review of the record as a whole we are convinced, for several reasons, that the district court's erroneous interim instruction did not influence the jury in the slightest. First, the court's final charge gave the jury the correct instruction and gave it in clear, concise, and unambiguous terms: the jury could consider custom and practice only in determining whether the existence of a conspiracy had been proved, not in considering any other alleged crime. Second, the jury did not appear to hark back to the interim instruction, which had been given more than two weeks before the final charge; it never requested reiteration of that earlier instruction; and when it asked for clarification of the court's final charge on conspiracy, it neither singled out the custom and practice portion for particular review, nor appeared to question the court's repeated admonition as to the limited role of that evidence.

Most importantly, contrary to defendants' contention that "the fate of the individual defendants at bar was sealed" by the receipt of the custom and practice evidence, it is clear that the jury did not indiscriminately

find the defendants guilty. As to Angelilli, it found four of the ten alleged extortionate transactions not proved and found all five of the alleged mail fraud transactions not proved. As to Butler, it found two of the eight alleged extortionate transactions not proved. And as to Ribotsky, it found one of the four alleged extortionate transactions not proved. The jury's concentration on individual transactions was evident not only from its ultimate conclusions, but also from the nature of its numerous requests for taped and documentary evidence and for the rereading of certain testimony during its deliberations. In every instance the request related to evidence of specific auctions held or attended by one of the defendants. In no instance did the jury make any request that appeared to be concerned with custom and practice evidence.

Finally, we note that in only one rereading of testimony requested by the jury was there any mention of the custom and practice of demanding top money. This evidence related to a transaction in which the buyer testified that he had paid top money but that he could not recall whether he had handed the money to Butler or to his auctioneer. When asked why he had paid top money, he answered, "Practice and custom I think was the word used here just a few minutes ago." On this single occasion, then, some custom and practice testimony was reread to the jury. This, however, was one of the transactions that the jury found *not* proved.

In all the circumstances we are left with the certain conviction that the erroneous instruction had no effect, and that the custom and practice evidence was not misused.

CONCLUSION

The convictions of all defendants are affirmed. The judgment as to Angelilli is remanded for correction to reflect his acquittal of the mail fraud charge under 18 U.S.C. § 1341.

FRIENDLY, *Circuit Judge,* concurring in the result:

I am unable to agree with the portion of Judge Kearse's excellent opinion that holds the New York Civil Court to be an "enterprise" within the meaning of 18 U.S.C. § 1962(b). No one would think of describing a court as an "enterprise" as a matter of ordinary English speech. Black's Law Dictionary, 5th Ed. defines enterprise as: "A venture or undertaking especially one involving financial commitment." The only pertinent definition in the Random House Dictionary of the English Language is "a company organized for commercial purposes; business firm". Definitions in other dictionaries I have consulted are even less pertinent. The problem here is totally different from that in *United States v. Turkette,* 49 L.W. 4743 (1981), where the Supreme Court criticized the First Circuit for reading the word "legitimate" into Congress' definition of "enterprise". The issue in *Turkette* was whether there was any justification for excluding from the term "enterprise" an association that would normally be deemed to come within it. The question here is whether there is any justification for expanding the term to include something that would normally be deemed to fall outside it. Conceivably the group of marshals who engaged in the sordid activities described by the majority could be deemed an "enterprise". But that was not what

the indictment charged or what the jury was told it must find in order to convict. It is of no consequence, as the majority urges, that obstruction of law enforcement is included in the definition of "racketeering activity" in § 1961(1). As the Court said in *Turkette, supra,* 49 L.W. at 4745:

> The "enterprise" is not "the pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all time remains a separate element which must be proved by the Government.

For these reasons, as well as others expressed by Judge Swygert dissenting in *United States v. Graywacz,* 603 F.2d 682, 690 (7 cir. 1979), *cert. denied,* 446 U.S. 935 (1980), I would vacate the convictions under RICO, 18 U.S.C. § 1962(c) and (d), but would allow those under the Hobbs Act, 18 U.S.C. § 1951, and the mail fraud statute, 18 U.S.C. § 1341, to stand.

I must also express concern over so much of the discussion of F.R.E. 404(b), as relates to participation of the defendants in similar transactions which were not a part of the conspiracy.[1] I could not at all agree that proof that one of the defendants had performed other acts of the precise nature of those here charged during much the same time frame would be "logically so weak that the relevance of the factual evidence will nearly always be outweighed by the probable prejudice resulting from its admission." Opinion, pp. 4749-50. The crimes here charged

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[1] As to acts which were a part of the conspiracy, I agree that Rule 404(b) has no application since these would not be "other crimes". Since it is not at all clear that the evidence of custom and practice did include any act of defendants that were not a part of the conspiracy, this portion of the opinion may well be unnecessary dictum.

were sufficiently unusual that such evidence would have been highly relevant as proof of design or system under Rule 404(b), see 2 Wigmore, Evidence, § 304 at 249 (Chadbourn rev. 1979)—"such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." McCormick also approves the use of evidence of other crimes by the accused "so nearly identical in method as to earmark them as the handiwork of the accused"—a device " so unusual and distinctive as to be like a signature", Evidence, § 190 at 449 and cases cited (Cleary ed. 1972). Judge Weinstein's Treatise on the Federal Rules of Evidence agrees that Rule 404(b) permits proof of prior crimes by the accused "when details of the crime show an individuality that, if repeated, are highly probative of the conclusion that they were committed by the same person." 2 Evidence ¶ 404.16 at 404-92-93 and cases cited in notes 21 and 22 (1980). Indeed, the Wright & Graham treatise cited by the majority seems to acquiesce in this view. See 22 Wright & Graham, Federal Practice and Procedure, § 5244 at 501 (1978). While it would have been appropriate for the judge to explain the limited basis for which the evidence was admitted, he was not bound to do so, at least in the absence of a request. See 2 Weinstein, *supra*, ¶ 404.19 at 404-117-119.

APPENDIX B—Order of United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of September one thousand nine hundred and eighty-one.

Present:

Hon. Henry J. Freindly,
Hon. Walter R. Mansfield,
Hon. Amalya L. Kearse,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PETER ANGELILLI, WILLIAM BUTLER, DONALD IRISH, and DONALD RIBOTSKY,

Defendants-Appellants.

80-1431—80-1434

Appeals from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed and that the judgment as to Peter Angelilli be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO, Clerk
by EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX C—Constitutional and Statutory Provisions Involved.

Due Process Clause of the Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Commerce Clause, Article 1, Section 8, Clause 3:

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Reserve Power Clause, Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

18 U.S.C. §1961(2):

> " 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof."

18 U.S.C. §1961(3):

> " 'person' includes any individual or entity capable of holding a legal or beneficial interest in property."

18 U.S.C. §1961(4):

> " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

18 U.S.C. §1962(c):

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. §1962(d):

> "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

18 U.S.C. §1951(a):

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

18 U.S.C. §1951(b) (2):

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of offical right."

18 U.S.C. §1341:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

28 U.S.C. Federal Rules of Evidence, Rule 406:

> "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

28 U.S.C. Federal Rules of Evidence, Rule 404(b):

> "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."